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Valerie S. Alabanza

WHEN ARE SETTLEMENT COMMUNICATIONS PROTECTED AS "OFFERS TO COMPROMISE" UNDER RULE 408?

Valerie S. Alabanza*

I. INTRODUCTION

Consider the following hypothetical. A rice producer signs a contract with a buyer, ABC Corporation, for the delivery of rice. ABC Corporation later refuses to pay the rice producer because its management believes the amount of rice delivered does not comply with the contract. Both sides meet several times and discuss possible remedies, but fail to reach an agreement. The rice producer files suit against ABC Corporation for breach of contract. At the trial, ABC tries to offer into evidence documents from the settlement discussions. The rice producers object to this evidence, contending that these are "offers to compromise" protected under Federal Rule of Evidence 408 ("Rule 408" or "the Rule").

These facts are similar to those recently considered by the Federal Circuit in *Johnson v. Land O'Lakes, Inc.*[1] In the

* Articles Editor, Santa Clara Law Review, Volume 40. J.D./M.B.A. candidate, Santa Clara University School of Law and Leavey School of Business and Administration; B.A., Boston College.

1. Johnson v. Land O'Lakes, Inc., 181 F.R.D. 388 (N.D. Iowa 1998). The main distinction between the hypothetical and *Johnson* is that the evidence at issue in *Johnson* was settlement discussions involving multiple parties: the defendant, Land O'Lakes, and other producers. *See id.* at 388-93.

The *Johnson* court discussed the various circuit court approaches to Rule 408. *See id.* at 390-93. In *Johnson*, a grain contract case, plaintiffs Larry and Marvin Johnson, grain producers, moved to exclude evidence of settlements or offers in other grain contract cases involving Land O'Lakes. *See id.* at 389. After analyzing the evidence at issue using different circuit court tests, the court ultimately granted the Johnsons' motion not under Rule 408, but under Rule 403. Under Rule 403, the court found that the prejudicial effect of the evidence outweighed its probative value, and prohibited the parties from presenting evidence concerning other settlements, or offers of settlement, in this case and other grain contract cases. *See id.* at 395. Although the *Johnson* court ulti-

hypothetical above, admissibility of the communications between ABC Corporation and the rice producers depends on whether the circuit court narrowly or broadly interprets the evidentiary rule.

The Federal Rule of Evidence 408 states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.[2]

Compared to the common law, Rule 408 provides greater protection for communications during settlement negotiations.[3] Currently, the circuit courts apply different rationales when considering communications protected by Rule 408.[4] The Ninth Circuit's "test" consists of quoting from the language of the Rule itself and from the treatise, *McCormick on Evidence*.[5] *McCormick* states that in order to protect a settlement communication, the communication must relate to an existing dispute.[6] Hence, if there is no dispute, and there is an admission of fact, the fact is admissible.[7]

Other circuits offer more guidance.[8] For example, the

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mately did not decide exclusion of evidence under Rule 408, the circumstances surrounding the case provide a good fact pattern with which to analyze different circuit court tests under Rule 408. *See* discussion *infra* Parts III-IV.

2. FED. R. EVID. 408.

3. *See* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 408.05[1], at 408-18 to -19 (Joseph M. McLaughlin ed., 2d ed. 1997).

4. *See* discussion *infra* Part II.D.1-8.

5. MCCORMICK ON EVIDENCE § 266, at 466-67 (John William Strong ed., 4th ed. 1992) [hereinafter MCCORMICK].

6. *See id.*

7. *See id.*

8. *See* discussion *infra* Part II.D.

test used by the Eleventh Circuit considers "whether the statements or conduct were intended to be part of the negotiations toward compromise."[9] The Third Circuit offers broader interpretation. The Third Circuit invokes Rule 408 whenever there is a "dispute" between the parties—with dispute defined as "a clear difference of opinion."[10] Thus, the circuit courts implement many "tests"—some broad, some narrow—to determine if Rule 408 protects certain settlement communications made before litigation.[11]

Part II of this comment summarizes the minimal protection provided by the common law with regard to evidence of offers to compromise.[12] Part II also presents the background of Federal Rule of Evidence 408, discussing the reasons behind the Rule and its scope.[13] Part III describes the need for a broader test in the Ninth Circuit.[14] Part IV analyzes the issue by presenting the current case law in other circuits[15] and applying other circuit court tests to the factual circumstances of *Johnson v. Land O'Lakes*.[16] Applying the facts of *Johnson* shows whether circuit courts have a broad or narrow interpretation of Rule 408. The Third Circuit's test, the broadest among the circuits analyzed, encourages parties to communicate most freely. Therefore, the Third Circuit's test best serves the public policy behind Rule 408—that of encouraging settlements.[17] Finally, Part V recommends that the Ninth Circuit adopt the Third Circuit's test.[18]

II. BACKGROUND

A. *Federal Common Law*

Under the federal common law, courts often admitted statements or conduct made during negotiations for compro-

9. Blu-J, Inc. v. Kemper C.P.A. Group, 916 F.2d 637, 642 (11th Cir. 1990).
10. Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 528 (3d Cir. 1995).
11. *See* discussion *infra* Part II.D.
12. *See infra* Part II.A.
13. *See infra* Part II.B.
14. *See infra* Part III.
15. *See infra* Part IV.D.
16. *See infra* Part IV.B.
17. *See* discussion *infra* Part IV.D.7.
18. *See infra* Part V.

mise.[19] However, admissions during negotiations were inadmissible in situations where the admission was stated hypothetically, made explicitly "without prejudice," or so intertwined with the offer as to be incomprehensible if read separately.[20]

This historically accepted doctrine had serious drawbacks: it discouraged and hampered freedom of communication between parties and placed restraints on efforts of settlement negotiations.[21] Under the common law, "it was the offer to do something in furtherance of the compromise that was deemed not to be admissible, not the facts that led up to the offer."[22] The common law rule was difficult to apply, resulting in a degree of arbitrariness, because it required the court to determine the motivation of the party's communication before ruling on its admissibility.[23] To avoid the arbitrary results of the common law, Rule 408 extended protection to statements made *during* compromise negotiations.[24]

B. *Rationale for Inadmissibility*

The two primary rationales for excluding an offer to compromise, or an acceptance of an offer are lack of relevancy and policy considerations.[25] First, evidence of an offer or an acceptance of an offer is irrelevant since the offer may be based on desire to resolve a dispute, as opposed to a concession of liability.[26] Second, exclusion of such evidence promotes the public policy of encouraging dispute settlements.[27] If courts admit evidence from settlement negotiations, parties engaging in negotiations would hesitate to communicate freely for

19. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.01, at 408-18 to -19.

20. *See* MCCORMICK, *supra* note 5, § 266, at 466; FED. R. EVID. 408 advisory committee's note.

21. *See* MCCORMICK, *supra* note 5, § 266, at 466; FED. R. EVID. 408 advisory committee's note; *see also* Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1106 (5th Cir. 1981).

22. 2 WEINSTEIN & BERGER, *supra* note 3, § 408.05, at 408-19.

23. *See* 2 *id.*

24. *See* MCCORMICK, *supra* note 5, § 266, at 466; FED. R. EVID. 408 advisory committee's note.

25. *See* MCCORMICK, *supra* note 5, § 266, at 466; FED. R. EVID. 408 advisory committee's note.

26. *See* MCCORMICK, *supra* note 5, § 266, at 466; FED. R. EVID. 408 advisory committee's note.

27. *See* MCCORMICK, *supra* note 5, § 266, at 466; FED. R. EVID. 408 advisory committee's note.

fear that communications could later be used against them.[28]

C. *Federal Rule of Evidence 408*

1. *The Scope of Rule 408*

Rule 408 covers more than just the three exclusion situations under the common law—hypothetical admissions, admissions expressly stated "without prejudice," or admissions inseparable from the offer.[29] Rule 408 extends protection to all conduct and statements made during negotiation.[30] This rule excludes all offers, suggestions, and proposals of settlement.[31] Like the common law, Rule 408 excludes evidence of an offer or acceptance of an offer where such evidence is used to prove the validity of a claim.[32] Thus, Rule 408 covers almost all communications during negotiations.

2. *Exceptions to Rule 408*

a. *Otherwise Discoverable Evidence*

Rule 408 "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of negotiations."[33] This exception allows a party to admit as evidence documents revealed during negotiations if they are "otherwise discoverable."[34] However, this exception is inapplicable if the party created the evidence, such as documents or statements, for the purpose of negotiations.[35] The rationale for allowing free communications during compromise negotiations is not intended to conflict with the rules of discovery. Therefore, a party cannot use Rule 408 to prevent the other side's right to discovery.[36]

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28. *See* Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1106 (5th Cir. 1981).
29. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.03[1], at 408-11.
30. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.05[2], at 408-20.
31. *See* MCCORMICK, *supra* note 5, § 266, at 466; FED. R. EVID. 408 advisory committee's note. The court must determine when a settlement communication classifies as an "offer" protected under Rule 408.
32. *See, e.g.*, Morris v. LTV Corp., 725 F.2d 1024, 1030 (5th Cir. 1984).
33. FED. R. EVID. 408.
34. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.07, at 408-26.
35. *See id.* at 408-27.
36. *See id.*

b. *Use of Evidence for Other Purposes*

Rule 408 "also does not require exclusion when evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[37] The Rule does not protect an offer for another purpose, since the Rule only excludes evidence intended to prove the validity or invalidity of the claim, or its amount.[38] Therefore, Rule 408 allows evidence of offers to compromise, or acceptances thereof, to prove a consequential, material fact in issue for purposes other than proving the validity or invalidity of the claim or its amount.[39]

3. *Area of Controversy Created by Rule 408*

Rule 408 allows for a more expanded protection of negotiations than the common law, resulting in freer communication between parties during such settlement discussions.[40] This expanded protection also results in a "controversy over whether a given statement falls within or without the protected area."[41] Therefore, Rule 408 requires the trial judge to determine whether statements or conduct are part of negotiations toward a compromise.[42]

Admissibility depends on whether the communication was part of compromise negotiations.[43] However, there is often no clear point to distinguish when negotiations begin.[44] The language of the Rule and the Advisory Committee's Note require an actual dispute regarding the validity of the claim.[45]

The Advisory Committee's Note expressly describes one situation where Rule 408 does not apply: "when the effort is to induce a creditor to settle an admittedly due amount for a

37. FED. R. EVID. 408.

38. *See* FED. R. EVID. 408 advisory committee's note.

39. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.08[1], at 408-27.

40. *See* MCCORMICK, *supra* note 5, § 266, at 466; FED. R. EVID. 408 advisory committee's note. Freer communication is advocated because it allows more opportunity for parties to settle and compromise, and thus leads to less litigation in the courts. *See id.*

41. FED. R. EVID. 408 advisory committee's note.

42. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.05[3], at 408-21.

43. *See* 2 *id.* § 408.06, at 408-22.

44. *See* 2 *id.* at 408-22 to -23.

45. *See* FED. R. EVID. 408 advisory committee's note.

lesser sum."[46] The Advisory Committee's Note distinguishes between direct disclosures and admissions of both the validity of the claim and the amount of damages.[47] For example, a direct disclosure such as, "All right, I was negligent, let's talk about damages," is inadmissible. However, a communication admitting both the claim's validity and damages, such as, "Of course I owe you the money, but unless you're willing to settle for less, you'll have to sue me for it," is admissible.[48]

To invoke Rule 408, the court must determine when an "actual dispute" or "an apparent difference of view between parties as to the validity of the claim" occurred.[49]

D. *Distinctions Between Circuit Courts Regarding Rule 408*

The circuit courts of appeals implement several "tests" or approaches to aid lower courts' determination of whether Rule 408 protects certain settlement communications made before litigation.[50] The test under each circuit depends on whether the court interprets Rule 408 broadly or narrowly.[51]

1. *The Fifth Circuit Test*

In *Ramada Development Co. v. Rauch*,[52] the Fifth Circuit explained the "otherwise discoverable" exception of Rule 408. The Fifth Circuit test for evaluating this exception is whether the communication was "created for the purpose of compromise negotiations."[53]

In *Ramada,* the plaintiff sued the defendant for breach of contract and sought damages, including the balance owed, for construction of a motel.[54] The defendant counter-claimed based on various theories of negligence.[55] One of the issues before the court was whether to admit into evidence a memorandum prepared approximately one year before litigation commenced.[56] An architect employed by Ramada created the

46. *Id.*
47. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.06, at 408-25.
48. *See* 2 *id.*
49. MCCORMICK, *supra* note 5, § 266, at 466-67.
50. *See* discussion *infra* Part II.D.1-8.
51. *See* discussion *infra* Part II.D.1-8.
52. Ramada Dev. Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981).
53. *Id.* at 1107 (quoting FED. R. EVID. 408).
54. *See id.* at 1097.
55. *See id.*
56. *See id.* at 1106.

memo, which Ramada used to study the alleged defects in the motel construction.[57] The Fifth Circuit held that the Rule is "whether the statements or conduct were intended to be part of the negotiations toward compromise. . . . The rule does not indicate that there must be a pre-trial understanding or agreement between the parties regarding the nature of the report."[58] Based on testimony from a key defense witness, the court found that Ramada prepared the report, at least in part, for the purpose of a settlement agreement.[59] As a result, the court excluded the memo under Rule 408.[60]

2. *The Eleventh Circuit Test*

The Eleventh Circuit articulated a test based on the Fifth Circuit's holding in *Ramada* and Rule 408.[61] In *Blu-J, Inc. v. Kemper C.P.A. Group,*[62] the court stated that "[t]he test under this rule is 'whether the statements or conduct were intended to be part of the negotiations toward compromise.'"[63]

In *Blu-J*, an investor sued an accounting firm to recover damages sustained after investing in a corporation for which the accounting firm prepared financial statements. The Eleventh Circuit faced the issue of whether the district court properly excluded reports and other materials relating to an independent evaluation of whether the accounting firm followed generally accepted accounting methods in preparing the financial statements for the corporation.[64] The Eleventh Circuit found that the independent evaluation fell squarely within the Fifth Circuit's *Ramada* holding.[65] The independent evaluation was within the purview of settlement negotiations and intended towards compromise. Thus, the court ex-

57. *See id.*

58. *Ramada*, 644 F.2d at 1107 (quoting 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 408[3], at 408-20 to -21(1980)).

59. *See id.* at 1107 n.8.

60. *See id.* at 1107.

61. *See* Blu-J, Inc. v. Kemper C.P.A. Group, 916 F.2d 637, 642 (11th Cir. 1990).

62. *Id.*

63. *Id.* (quoting *Ramada*, 644 F.2d at 1106); *see also* North Am. Biologicals, Inc. v. Illinois Employers Ins. of Wausau, 931 F.2d 839 (11th Cir. 1991), *amended on reh'g*, 938 F.2d 1265 (11th Cir. 1991); Lamplighter Dinner Theater v. Liberty Mut. Ins. Co., 792 F.2d 1036 (11th Cir. 1986).

64. *See Blu-J*, 916 F.2d at 641. The report was prepared by mutual agreement of both parties. *See id.* at 642.

65. *See id.* at 642.

cluded the evidence under Rule 408.[66]

3. *The Tenth Circuit Test*

To exclude compromise negotiations in the Tenth Circuit, discussions must "crystallize to the point of threatened litigation."[67] This is a very strict standard, providing a narrow interpretation of Rule 408.[68]

In *Big O Tire Dealers v. Goodyear Tire & Rubber Co.*,[69] Big O sued Goodyear in a trademark infringement case, claiming that Goodyear violated Big O's trademark "Bigfoot."[70] Big O sought to introduce pre-litigation communications between Big O and Goodyear wherein Big O asked that Goodyear cease advertising Goodyear's version of "Bigfoot." Furthermore, Big O also sought to introduce Goodyear's response to Big O—that it would continue using "Bigfoot" as long as the advertising was successful.[71]

Goodyear argued for exclusion of these communications under Rule 408 because they constituted compromise negotiations.[72] The Tenth Circuit concluded that the district court did not commit manifest error in deciding that the disputed statements were "business communications and not compromise negotiations."[73] The Tenth Circuit declared that the communications "had not [yet] crystallized to the point of threatened litigation, a clear cut-off point . . . ."[74]

In another Tenth Circuit case, *Towerridge, Inc. v. T.A.O., Inc.*,[75] Towerridge, a subcontractor on a federal construction project, sued the principal contractor, T.A.O., to recover an amount allegedly owed under the subcontract.[76] In the lower

66. *See id.*

67. Big O Tire Dealers v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1373 (10th Cir. 1977).

68. *See* Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 527 (3d Cir. 1995). The Third Circuit concluded that the Tenth Circuit test was too strict a standard for an application of Rule 408. *See id.* at 527; *see also* Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161 (S.D.N.Y. 1991) (finding that there are other factors to be considered apart from any indicia of threatened litigation).

69. *Big O Tire*, 561 F.2d at 1365.

70. *See id.* at 1367-68.

71. *See id.* at 1368.

72. *See id.* at 1372.

73. *Id.* at 1373.

74. *Id.*

75. Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758 (10th Cir. 1997).

76. *See id.* at 760.

court, T.A.O. argued against the admission of evidence regarding a settlement in a separate action between T.A.O. and the government.[77] The Tenth Circuit stated that Rule 408 is inapplicable where evidence concerns a settlement of a claim other than the one litigated.[78] The Tenth Circuit held that Rule 408 only bars admission of evidence of settlement communications "if the evidence is offered to prove 'liability for or invalidity of the claim or its amount,' and the evidence at issue here was not offered for that forbidden purpose."[79] Therefore, the Tenth Circuit applies Rule 408 where the evidence offered helps prove liability of a claim, but only if that evidence involves statements clearly reaching a point of threatened litigation.

4. *The Seventh Circuit Test*

In *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage*,[80] the Seventh Circuit defined a "dispute" arising under Rule 408.[81] There, S.A. Healy sued the city sewage authority for breach of contract.[82] When S.A. Healy sought to adjust the contract price because of unexpected difficulties and increased costs of construction, the sewage authority refused.[83] The Seventh Circuit test essentially states that a "dispute" under Rule 408 does not occur until a claim is rejected.[84] This definition yields a broader interpretation of Rule 408 than other circuits discussed thus far because it requires an assertion and rejection of a claim before meeting the definition of a "dispute" under Rule 408.

The Seventh Circuit also considered the issue of when a "claim" arises within the meaning of Rule 408.[85] The sewage authority complained about the admission into evidence of its engineer's statement that Healy's price adjustment claim

77. *See id.* at 769.

78. *See id.* at 770 (citing Broadcort Capital Corp. v. Summa Med. Corp., 972 F.2d 1183, 1194 (10th Cir. 1992)).

79. *Id.* (quoting FED. R. EVID. 408).

80. S.A. Healy Co. v. Milwaukee Metro. Sewerage, 50 F.3d 476, 478 (7th Cir. 1995).

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.* at 480. A claim must be rejected for a "dispute" to occur; until then, Rule 408 does not apply. *See id.*

85. *See id.* at 480.

"probably had merit."[86] The contract between the sewage authority and S.A. Healy contained a disputes clause, which required submission of all claims to the engineer for determination.[87] The sewage authority contended that a "claim" under Rule 408 implies a dispute; however, the Seventh Circuit rejected this interpretation, stating instead that "[a] dispute arises only when a claim is rejected at the initial or some subsequent level. Had the sewage authority accepted Healy's claim for a price adjustment, no dispute would have arisen. And it follows that until the rejection of that claim, no dispute *had* arisen."[88] A dispute did not exist yet because "when the engineer stated to Healy that its claim probably *had* merit, the claim had *not* yet been rejected."[89] The court then ruled that Rule 408 was inapplicable,[90] stating that "Rule 408 . . . forbids the use of evidence of attempts to compromise a claim to prove the claim. The purpose of the rule is to facilitate the settlement of disputes by encouraging the making of offers to compromise."[91]

For exclusion under Rule 408, the Seventh Circuit requires more than "business communications" or disagreements between potentially adverse parties—"there must be an actual dispute as to existing claims."[92]

5. *The Eighth Circuit Test*

In *Crues v. KFC Corporation*,[93] a case dealing with the issue under Rule 408, the Eighth Circuit found that the district court did not abuse its discretion in admitting disputed evidence.[94] Crues sued for fraudulent misrepresentation after

86. *S.A. Healy*, 50 F.3d at 480.

87. *See id.*

88. *Id.*

89. *Id.* at 480 (emphasis added) (citing General Leaseways, Inc. v. National Truck Leasing Ass'n, 830 F.2d 716, 724 n.12 (7th Cir. 1987); *In re* B.D. Int'l Discount Corp., 701 F.2d 1071, 1074 n.5 (2d Cir. 1983)).

90. *See id.* at 480.

91. *Id.* at 480; *see also* Winchester Packaging, Inc. v. Mobil Chem. Co., 14 F.3d 316, 320 (7th Cir. 1994); Central Soya Co. v. Epstein Fisheries, Inc., 676 F.2d 939, 944 (7th Cir. 1982); 2 WEINSTEIN & BERGER, *supra* note 3, § 408.02[01]-[02].

92. *S.A. Healy*, 50 F.3d at 480; *see* Johnson v. Land O'Lakes, 181 F.R.D. 388, 392 (N.D. Iowa 1998).

93. Crues v. KFC Corp., 768 F.2d 230 (8th Cir. 1985).

94. *See id.* at 233-34.

purchasing a KFC franchise.[95] Crues argued that two offers he made to KFC to convert his fish franchise into a chicken franchise were offers to compromise under Rule 408 and therefore inadmissible.[96] The Eighth Circuit stated that "Rule 408 applies only to an offer to compromise a 'claim,' and it is not clear that Crues had a claim against KFC [at the time of the offers]."[97] While Crues made the same offer after litigation began, this fact did not render the evidence of the previous offers inadmissible.[98]

Therefore, the Eighth Circuit interprets "dispute" under Rule 408 to require at least threatened litigation. This test does not give much more guidance than does the language of the Rule itself.

6. *The Sixth Circuit Test*

The Sixth Circuit Court of Appeals recently found Rule 408 inapplicable to bar evidence of alleged threats made during negotiations, where the statements were later used to prove liability for making or acting on the threats.[99] In *Uforma/Shelby Business Forms, Inc. v. NLRB*,[100] petitioner Uforma/Shelby ("Uforma") appealed the NLRB's determination that Uforma violated the National Labor Relations Act.[101] Uforma claimed that Rule 408 barred the admission into evidence of negotiation discussions wherein Uforma threatened to lay off employees if a local union, who represented various employees at the Uforma facility, pursued its grievance.[102] Uforma alleged that it made the statements during negotiations intended to resolve the grievance.[103] However, the Sixth Circuit declared:

> Rule 408 is . . . inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; e.g., libel, assault, breach of contract, *unfair labor practice,* and the like . . . . Rule 408 does not

95. *See id.* at 232.
96. *See id.* at 233.
97. *Id.*
98. *See id.*
99. *See* Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284, 1293-94 (6th Cir. 1997).
100. *Id.*
101. *See id.* at 1287.
102. *See id.* at 1293.
103. *See id.*

> prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations.[104]

The Sixth Circuit also explained the "general principle" that "Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was the subject of compromise, not some other claim."[105] Therefore, Rule 408 did not exclude evidence of the alleged threats.[106]

The Sixth Circuit interprets the term "claim" in Rule 408 to mean only the claim concerning the subject of compromise. This narrow interpretation of Rule 408 leaves settlement discussions involving other claims unprotected.

7. *The Third Circuit Test*

The Third Circuit provides the broadest definition of "dispute" under Rule 408. Disputes, according to the Third Circuit, involve "a clear difference of opinion between the parties."[107]

In *Affiliated Manufacturers, Inc. v. Aluminum Company of America*,[108] the Third Circuit affirmed the district court's decision to exclude certain documents as evidence of settlement negotiation.[109] The excluded testimonial evidence concerned two meetings between the parties prior to the commencement of the action.[110] A disagreement already existed between the parties at the time of the meetings at issue, which arose from an unperformed contract for the design and fabrication of an automated system.[111] Prior to the commencement of the action, the parties disagreed over unpaid invoices.[112] The Third Circuit held that "[t]he district court properly interpreted the scope of the term 'dispute' to include

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104. *Id.* (quoting 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR. FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5314 (1st ed. 1980)).

105. *Uforma/Shelby*, 111 F.3d at 1293 (quoting 23 WRIGHT & GRAHAM, *supra* note 104, § 5314, at 282, n.25).

106. *Id.* at 1294.

107. Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 528 (3d Cir. 1995).

108. *Id.*

109. *See id.* at 523. This case is noteworthy because the lower court explicitly rejects the Tenth Circuit test as providing too strict of a standard. *See id.* at 526.

110. *See id.* at 523-25.

111. *See id.* at 523.

112. *See id.*

a clear difference of opinion between the parties here concerning payment of two invoices."[113]

In *Affiliated Manufacturers*,[114] the appellate court discussed how the court below declined to follow the test set forth by the Tenth Circuit in *Big O Tire*.[115] The district court explained that the Tenth Circuit's application of Rule 408 in *Big O Tire* was "too restrictive in its establishment of 'the point of threatened litigation [as] a clear cut-off point,' for application."[116] The Third Circuit pointed out that "other courts make clear that the Rule 408 exclusion applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation."[117]

8. *The Ninth Circuit Test*

Essentially, the Ninth Circuit test consists merely of the language of Rule 408 itself and the Advisory Committee's Note, which directly cites *McCormick*.[118]

In *Cassino v. Reichhold Chemicals, Inc.*,[119] the Ninth Circuit discussed Rule 408 but did not articulate a specific test to determine when to protect offers of compromise under Rule 408.[120] In *Cassino,* the court held that a settlement agreement and release form offered by the defendant at the plaintiff's termination meeting was admissible as evidence.[121] The district court explained that the plaintiff, at the time of the termination meeting, had not asserted any claim against the defendant.[122] The Ninth Circuit upheld the district court's admission of the proposed termination agreement and stated that "Rule 408 should not be used to bar relevant evidence

113. *Affiliated Mfrs.*, 56 F.3d at 528 (emphasis added).

114. *Id.*

115. *See id.* at 527; Big O Tire Dealers v. Goodyear Tire & Rubber Co., 561 F.2d 1365 (10th Cir. 1977).

116. *Affiliated Mfrs.*, 56 F.3d at 526 (quoting *Big O Tire*, 561 F.2d at 1373).

117. *Id.* at 527 (citing Dallis v. Aetna Life Ins. Co., 768 F.2d 1303, 1307 (11th Cir. 1985) (holding admissible testimony involving settlement of a similar claim between a party to action and a third party, where no evidence that validity or amount of payment was disputed)).

118. *See* FED. R. EVID. 408 advisory committee's note; *see also* MCCORMICK, *supra* note 5, § 266, at 466.

119. Cassino v. Reichhold Chems., Inc., 817 F.2d 1338 (9th Cir. 1987).

120. *See id.*

121. *See id.* at 1342.

122. *See id.*

concerning the circumstances of the termination itself simply because one party calls its communication with the other party a 'settlement offer.'"[123]

In *United States v. Contra Costa County Water Dist.*,[124] the Ninth Circuit followed the language of Rule 408, stating that settlement negotiations are "not admissible to prove liability for or invalidity of the claim or its amount."[125] The court also discussed the two principles underlying the Rule articulated in the Advisory Committee's Note,[126] which cites directly to *McCormick*.[127] Courts in the Ninth Circuit remain limited to the language of the Rule and *McCormick* because a trial court must still determine when a given statement falls within the protected area.[128]

In *United States v. Pend Oreille Public Utility District No. 1*,[129] a dispute over title to riverbed land,[130] the United States government brought a trespass action against the Pend Oreille Public Utility District ("PUD") on behalf of the Kalispel Indian Tribe. The government alleged that a dam was traditionally used by the Kalispel for agricultural purposes.[131] The PUD contended that evidence of easements offered in settlement discussions of a prior dispute were inadmissible under Rule 408.[132] Since the government introduced the evidence for the relevant "other purpose" of proving the land suitable for agricultural use prior to the construction of the dam, the evidence was not barred by Rule 408.[133]

In *Henry v. Radio Station KSAN*,[134] the court stated that statements not made in connection with settlement offers are not protected under Rule 408.[135] The court in *Henry* held that the law favors the settlement of controversies; therefore, evi-

123. *Id.* at 1343.
124. United States v. Contra Costa County Water Dist., 678 F.2d 90 (9th Cir. 1982).
125. *Id.* at 92 (quoting FED. R. EVID. 408).
126. *See* FED. R. EVID. 408 advisory committee's note.
127. *See Contra Costa County Water Dist.*, 678 F.2d at 90.
128. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.05[3], at 408-21.
129. United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502 (9th Cir. 1991).
130. *See id.* at 1507.
131. *See id.* at 1504.
132. *See id.* at 1507 n.4.
133. *See id.*
134. Henry v. Radio Station KSAN, 374 F. Supp. 260 (N.D. Cal. 1974).
135. *See id.* at 263 n.1.

dence of offers to settle and terms of settlement are not admissible.[136] However, the court also stated that such a rule does not preclude the admissibility of an unqualified admission of fact not inseparably related to an offer of settlement.[137]

Essentially, the Ninth Circuit test consists of quoting the language of the Rule itself and of *McCormick on Evidence.* This provides limited guidance and does not help courts determine when Rule 408 protects communications as "offers to compromise."

III. IDENTIFICATION OF THE ISSUE

In deciding evidentiary issues under Rule 408, the Ninth Circuit quotes from the language of the Rule itself or from *McCormick on Evidence.*[138] This test gives less guidance than other circuit courts' tests.[139] Using only the language of Rule 408 provides trial courts in the Ninth Circuit with limited guidance[140] and may discourage the freedom of discussion essential to settlement negotiations.[141] In order to promote the public policy behind Rule 408, the Ninth Circuit must provide further guidance.

To protect a communication under Rule 408, the district court must determine when an "actual dispute" or "an apparent difference of view between parties as to the validity of the claim" occurred.[142] Further, the court must determine that there is an "offer to compromise" when invoking the application of Rule 408.

Therefore, the issue presented in this comment is whether the Ninth Circuit should develop a test of its own that goes beyond the *McCormick* test or adopt a test of another circuit. In either case, the Ninth Circuit must provide a broader interpretation of Rule 408 to further the Rule's public policy goals.

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136. *See id.*
137. *See id.*
138. *See* discussion *supra* Part II.D.8.
139. *See* discussion *supra* Part II.D.1-7.
140. *See* Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws,* 10 OHIO ST. J. ON DISP. RESOL. 157, 163 (1994).
141. *See id.* at 165.
142. MCCORMICK, *supra* note 5, § 266, at 466.

IV. ANALYSIS

A. *The Consequences of Rule 408*

Although Rule 408 provides broader protection of negotiations of private settlement than the common law, it still has one limitation: "it excludes evidence of negotiations only when offered to prove the validity or amount of the plaintiff's claim."[143] A narrow interpretation of this language leads to some desirable consequences.[144] For example, Rule 408 is inapplicable where negotiating parties abuse the negotiation process by committing fraud or making threats and acting on those threats.[145] Furthermore, evidence of information otherwise discoverable is not immunized from discovery because it is presented during compromise negotiations.[146]

The Rule's limiting scope, however, may still discourage the freedom of discussion essential to settlement negotiations.[147] The Rule does not apply where a party offers evidence of other related claims discussed during negotiations.[148] The Rule "does not prevent the collateral use of statements in settlement negotiations from being used in subsequent litigation."[149] Thus, even though Rule 408 provides more expanded protection than the common law, it may still have a chilling effect on the informal discussion that provides the backbone of settlement negotiations.[150]

Rule 408 induces controversy by requiring a judge to determine whether parties intended statements or conduct to be part of negotiations toward a compromise.[151] The language of the Rule and the Advisory Committee's Note dictates that there must be an actual dispute regarding the claim's validity for Rule 408 to apply.[152] Further, admissibility depends on whether the communication was part of compromise negotia-

143. Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 449 (1984).

144. *See id.*

145. *See id.; see also supra* note 109 and accompanying text.

146. *See* Note, *supra* note 143, at 449; *see also supra* note 109 and accompanying text.

147. *See id.*

148. *See* Rosenberg, *supra* note 140, at 164.

149. *Id.* at 165.

150. *See id.*

151. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.08, at 408-27.

152. *See* FED. R. EVID. 408 advisory committee's note.

tions.[153] Courts struggle to determine when Rule 408 protects certain communications because there is no distinguishing sign that establishes when negotiations begin.[154] The public policy behind Rule 408 is to encourage settlements; therefore, a broad interpretation of the Rule, as provided by the Third Circuit, promotes parties to communicate more freely pursuant to Rule 408.

B. *Factual Example:* Johnson v. Land O'Lakes

In *Johnson*,[155] the evidence at issue concerned settlements or offers of settlement in other grain contract cases[156] under an analysis of Rule 408.[157] The plaintiffs contended that "the court should preclude any evidence, testimony, or mention of settlements, work-outs, or other arrangements among and between any producer [who has a grain contract] and Land O'Lakes, because such testimony or evidence would be in the nature of settlement discussions or compromises of disputed claims."[158] Land O'Lakes argued against excluding the evidence pursuant to Rule 408 "because that rule applies only to settlement or compromise of a 'claim.'"[159] Land O'Lakes also stated that they entered into negotiations with the producers prior to the time a "claim" existed.[160] The court recognized that each producer had, or may have had, the same "claim."[161] That is, each producer may have the same cause of action based on similar circumstances against Land O'Lakes, and Land O'Lakes may have the same "claim" against each producer.[162]

In *Johnson*, admissibility ultimately depended on the relevance of such evidence under an analysis of Rule 403, balancing the probative value of the evidence against its prejudicial effect.[163] The disputed evidence was that the

153. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.05[3], at 408-21.
154. *See* FED. R. EVID. 408 report of house committee on the judiciary; *see also* MCCORMICK, *supra* note 5, § 266, at 466-67.
155. *See* Johnson v. Land O'Lakes, Inc., 181 F.R.D. 388 (N.D. Iowa 1998).
156. *See supra* note 1.
157. *See Johnson*, 181 F.R.D. at 390.
158. *Id.*
159. *Id.* (citing Crues v. KFC Corp., 768 F.2d 230, 233 (8th Cir. 1985)).
160. *See id.*
161. *See id.* at 393.
162. *See id.*
163. See *Johnson*, 181 F.R.D. at 393.

plaintiffs were two of only five producers with grain contract cases at the particular facility who did not settle with Land O'Lakes.[164] The plaintiffs argued to exclude this evidence under Rule 403 because of its prejudicial effect.[165] Land O'Lakes claimed that the probative value of evidence that other producers ultimately delivered grain on the contracts or satisfied the contracts was relevant and not outweighed by any prejudice.[166] However, the court agreed with the plaintiffs and excluded the evidence pursuant to Rule 403.[167] Although the *Johnson* court did not adjudicate the case under Rule 408, the facts surrounding the case provide a useful basis for evaluating the various circuit court tests for admissibility under Rule 408.

C. *Analysis Using the Ninth Circuit Test*

Other than the *McCormick* test, the Ninth Circuit fails to provide a more helpful test that broadly defines when an "actual dispute" exists under Rule 408.[168] It held that Rule 408 should not bar relevant evidence of communications simply because one party calls the communication a "settlement offer."[169] The Ninth Circuit also admitted evidence under Rule 408 when the evidence was introduced for "other purposes" as allowed by the language of Rule 408.[170] In addition, the district court in *Henry v. Radio Station KSAN*[171] followed the language of the Rule itself in holding that the Rule does not prevent the admissibility of an admission that is not inseparably related to an offer of settlement.[172] The court further ruled that Rule 408 does not protect statements unconnected with settlement offers.[173] Finally, in *United States v. Contra Costa County Water District*,[174] the Ninth Circuit followed the

164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.* at 393-94.
168. *See* discussion *supra* Part II.D.8.
169. *See, e.g.*, Cassino v. Reichold Chems., Inc., 817 F.2d 1338, 1343 (9th Cir. 1987).
170. *See* United States v. Pend Oreille Pub. Util. Dist. No. 1, 926 F.2d 1502, 1507 n.4 (9th Cir. 1991); *see also* FED. R. EVID. 408.
171. Henry v. Radio Station KSA, 374 F. Supp. 260 (N.D. Cal. 1974).
172. *See Pend Oreille*, 926 F.2d at 1507 n.4; *see also* FED. R. EVID. 408.
173. *See Pend Oreille*, 926 F.2d at 1507 n.4.
174. United States v. Contra Costa County Water Dist., 678 F.2d 90 (9th Cir. 1982).

language of Rule 408, stating that settlement negotiations are "not admissible to prove liability for or invalidity of the claim or its amount."[175]

If called to analyze the *Johnson* issue, the Ninth Circuit would probably use the language of the Rule and *McCormick*, as it has done previously.[176] If Land O'Lakes convinced the Ninth Circuit that it entered negotiations prior to the existence of any claim, then Rule 408 would not apply and the evidence at issue would be admitted.[177] By relying upon only the language of Rule 408, the Ninth Circuit is bound by the scope and limitations of the Rule.[178]

D. *Analysis Using Other Circuits' Approaches*

The rest of Part IV applies different circuit tests to the facts of *Johnson* to determine which test provides the broadest interpretation of Rule 408.[179]

1. *The Fifth Circuit*

In *Ramada,*[180] the Fifth Circuit held that "the rule is whether the statements or conduct were intended to be part of the negotiations toward compromise."[181] The Fifth Circuit found that a report made by an architect employed by Ramada was created for the purpose of a settlement agreement, and therefore excluded the report pursuant to Rule 408.[182]

The Fifth Circuit definition is broader than the Ninth Circuit test, allowing exclusion of *any* statement or conduct during negotiations directed towards compromise.[183] Applying this definition to *Johnson*, the Fifth Circuit would prohibit the admission of the evidence at issue if the Johnsons intended it to facilitate a compromise with Land O' Lakes.

Admissibility depends on whether Rule 408 applies to the settlement or compromise of a "claim." The Johnsons sought to exclude evidence concerning information related to settle-

175. *Id.* at 92 (quoting FED. R. EVID. 408).
176. *See id.*
177. *See* Johnson v. Land O'Lakes, 181 F.R.D. 388, 390 (N.D. Iowa 1998).
178. *See* discussion *supra* Part IV.A.
179. *See infra* Part IV.D.1-7.
180. Ramada Dev. Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981).
181. *Id.* at 1106 (quoting 2 WEINSTEIN & BERGER, *supra* note 58, § 408[3], at 408-20 to -21).
182. *See id.* at 1107.
183. *See id.*

ments or offers of settlement in other grain contract cases.[184] The language of *Ramada* does not address whether Rule 408 prohibits the use of evidence of settlement negotiations in subsequent cases.[185] The Fifth Circuit would probably admit the information concerning the other grain contract cases due to Rule 408's limited scope, which would not protect evidence of other related claims.[186] Although this test is broader than the Ninth Circuit's, it still would limit the Rule's application in the *Johnson* case.

2. *The Eleventh Circuit*

The Eleventh Circuit essentially adopted the Fifth Circuit test.[187] In *Blu-J,*[188] the Eleventh Circuit held that "[t]he test in this circuit to determine whether statements fall within Rule 408 is 'whether the statements or conduct were intended to be part of the negotiations toward compromise.'"[189]

The Eleventh Circuit, like the Fifth Circuit, could refuse to admit evidence of previous grain contract cases in *Johnson*, if the communication was intended to reach a compromise. Again, Rule 408 excludes only evidence of settlement discussions involving the same "claim." Since the evidence at issue involved settlements of other cases against the defendants, the Eleventh Circuit would not exclude it under Rule 408.[190] Adopting this test would not extend Rule 408 to exclude the evidence in *Johnson*.[191]

3. *The Tenth Circuit*

In *Big O Tire,* the Tenth Circuit held that settlement discussions must "crystallize to the point of threatened litigation" before Rule 408 applies.[192] This provides a very narrow

184. *See* Johnson v. Land O'Lakes, 181 F.R.D. 388, 390 (N.D. Iowa. 1998).

185. *See Ramada,* 644 F.2d at 1107.

186. *See supra* notes 160-63 and accompanying text.

187. *See* Blu-J, Inc. v. Kemper C.P.A. Group, 916 F.2d 637, 642 (11th Cir. 1990).

188. *Id.*

189. *Id.* at 642 (quoting *Ramada,* 644 F.2d at 1106 (quoting 2 WEINSTEIN & BERGER, *supra* note 58, § 408[3], at 408-20 to -21)).

190. *See* discussion *supra* Part IV.A.

191. *See* discussion *supra* Part IV.D.2.

192. Big O Tire Dealers Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1373 (10th Cir. 1977); *see also Rule 408: Compromise and Offers to Compromise,* 12 TOURO L. REV. 443, 450 (1996).

interpretation of the term "dispute" in Rule 408.[193] The Tenth Circuit also observed that "Rule 408 does not require the exclusion of evidence regarding the settlement of a claim different from the one litigated."[194]

In *Johnson*, the plaintiffs sought to exclude evidence of settlement discussions in claims involving settlements between Land O' Lakes and other producers.[195] Therefore, under the Tenth Circuit analysis, Rule 408 would be inapplicable and the evidence admitted.[196]

4. *The Seventh Circuit*

The Seventh Circuit requires more than "business communications" or disagreements between potentially adverse parties for exclusion under Rule 408.[197] For communications to fall within Rule 408's protection, "there must be an actual dispute as to existing claims."[198] In *S.A. Healy*,[199] the court held that "[a] dispute arises only when a claim is rejected at the initial or some subsequent level. Had the sewage authority accepted Healy's claim for a price adjustment, no dispute would have arisen. And it follows that until the rejection of that claim, no dispute *had* arisen."[200]

Until an actual dispute arose, requiring rejection of claims for performance by the parties, Rule 408 did not apply.[201] Since no rejection of claims for performance arose, the Seventh Circuit would not exclude evidence concerning discussions between Land O' Lakes and the grain producers under Rule 408.

The Seventh Circuit test provides a broader interpretation of Rule 408 than other circuits considered thus far because it provides a time frame in the definition of a "dispute"

193. *See* Affiliated Mfrs, Inc. v. Aluminum Co. of Am., 56 F.3d 521, 527 (3d Cir. 1995) (citations omitted).

194. Johnson v. Land O'Lakes, 181 F.R.D. 388, 393 (N.D. Iowa 1998) (quoting Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758, 770 (10th Cir. 1997)); *accord* Broadcort Capital Corp. v. Summa Med. Corp., 972 F.2d 1183, 1194 (10th Cir. 1992).

195. *See Johnson*, 181 F.R.D. at 393.

196. *See id.*

197. *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 50 F.3d 476, 480 (7th Cir. 1995).

198. *Johnson*, 181 F.R.D. at 392 (citing *S.A. Healy*, 50 F.3d at 480).

199. *S.A. Healy*, 50 F.3d at 476.

200. *Id.* at 480.

201. *See Johnson*, 181 F.R.D. at 391.

under Rule 408.[202] However, Rule 408 would still not protect the evidence in the *Johnson* case under this definition.

5. *The Eighth Circuit*

In *Crues*,[203] the Eighth Circuit stated that "Rule 408 applies only to an offer to compromise a 'claim.'"[204] The facts in *Crues* were ambiguous as to whether Crues had a claim against KFC when making the offers to compromise.[205] The court admitted the evidence.[206] Similarly, Land O' Lakes asserted that it entered into negotiations with various producers before any "claim" existed with the Johnsons.[207] Therefore, the Eighth Circuit would not bar evidence of the settlement discussions with other producers.[208]

The Eighth Circuit test does not provide more guidance than the language of the Rule itself.[209] Thus, the Ninth Circuit should not adopt the Eighth Circuit test.

6. *The Sixth Circuit*

The Sixth Circuit explained, in *Uforma/Shelby*,[210] that the "general principle" behind Rule 408 is that it "only bars the use of compromise evidence to prove the validity or invalidity of the claim that was *the subject of compromise, not some other claim.*"[211] Similar to the Tenth Circuit's result,[212] Rule 408 does not bar evidence of the settlement discussions concerning different claims between Land O' Lakes and other producers under the Sixth Circuit test.[213]

The Sixth Circuit provides more guidance than the language of the Rule itself because it explicitly limits "claim" to the one concerning the subject of the compromise, not some other claim.[214] This definition provides a narrow interpreta-

202. *See* discussion *supra* Part II.D.4.
203. Crues v. KFC Corp., 768 F.2d 230 (8th Cir. 1985).
204. *Id.* at 233.
205. *See id.*
206. *See id.*
207. Johnson v. Land O'Lakes, 181 F.R.D. 388, 390-91 (N.D. Iowa 1998).
208. *See id.* at 391.
209. *See* discussion *supra* Part II.D.5.
210. Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997).
211. *Id.* at 1293-94 (quoting 23 WRIGHT & GRAHAM, *supra* note 104, § 5314, at 282 n.25) (emphasis added).
212. *See supra* Part IV.D.3.
213. *See Johnson*, 181 F.R.D. at 393.
214. *See* discussion *supra* Part II.D.6.

tion of Rule 408, as it does not protect settlement discussions of other claims. Therefore, the Ninth Circuit would not broaden its test by adopting the Sixth Circuit test.

7. *The Third Circuit*

In *Affiliated Manufacturers*,[215] the Third Circuit interpreted the scope of the term "dispute" in Rule 408 to include "a clear difference of opinion between the parties."[216] The court also discussed how the district court declined to follow the Tenth Circuit test in *Big O Tire*.[217] The Third Circuit pointed out that "other courts make clear that the Rule 408 exclusion applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation."[218] Thus, the meaning of "dispute" according to the *Affiliated Manufacturers* court includes "both litigation and less formal stages of a dispute."[219]

The "trigger" for the application of Rule 408 in the Third Circuit appears to be "whether the parties have reached a clear difference of opinion as to what performance is required."[220] Exactly when the parties reach this point depends on the factual circumstances of each case.[221] In *Johnson,* the court recognized that each producer had or may have had the same "claim," as each had the same cause of action against Land O'Lakes. Similarly, Land O'Lakes had or may have had the same "claim" against each producer.[222] If the court found that the Johnsons' claim was indeed the same as the other producers' settled claims, then the other producers' claims may trigger the "clear difference of opinion." That is, the "claim" commenced with the other producers' causes of action since each of the claims arose out of similar contracts and circumstances against the same defendant. If Land O'Lakes

215. Affiliated Mfrs, Inc. v. Aluminum Co. of Am., 56 F.3d 521 (3d Cir. 1995).

216. *Id.* at 528.

217. *See id.* at 527 (citing Big O Tire Dealers v. Goodyear Tire & Rubber Co., 561 F.2d 1365 (10th Cir. 1977)).

218. *Id.* at 527 (citing Dallis v. Aetna Life Ins. Co., 768 F.2d 1303, 1307 (11th Cir. 1985) (holding that testimony involving settlement of similar claim between party to action and a third party, where there is no evidence that validity or amount of payment had been disputed, was admissible)).

219. Johnson v. Land O'Lakes, 181 F.R.D. 388, 392 (N.D. Iowa 1998) (citing *Affiliated Mfrs.*, 56 F.3d at 528).

220. *Id.*

221. *See id.*

222. *See id.* at 393.

and the Johnsons reached a "clear difference of opinion" during the other producers' settlement negotiations, offers discussed during those settlement negotiations have a greater chance of being excluded by Rule 408.

The Third Circuit's interpretation provides a broader definition of "dispute" under the language of Rule 408 than the other circuits.[223] The Third Circuit's definition of "dispute" promotes the policy considerations behind the creation of Rule 408. Excluding evidence of an offer to compromise a disputed claim, or an acceptance of an offer, promotes the public policy of encouraging settlements of disputes without court involvement.[224] Adopting the Third Circuit's test would provide the Ninth Circuit with a broader interpretation of Rule 408, and encourage freer communications during settlement negotiations.

V. PROPOSAL

The Ninth Circuit should expressly adopt a broader test to determine when Rule 408 protects settlement communications. Its use of the *McCormick* test is limited by the language and scope of the Rule.[225] Other circuits articulate tests or approaches that provide more guidance in the areas of controversy created by Rule 408. These tests aid judges in determining whether parties intended statements or conduct to be part of negotiations toward a compromise.[226]

Other circuit tests follow either a broad or narrow interpretation of the Rule. The Fifth Circuit and the Eleventh Circuit hold that Rule 408 applies where the evidence was intended to reach a compromise.[227] The Tenth Circuit articulates a stricter standard, requiring settlement discussions to "crystallize to the point of threatened litigation" before being protected under Rule 408.[228] The Eighth Circuit similarly finds that "litigation must be taking place or be threatened."[229] The Sixth Circuit narrowly states the "general prin-

223. *See* discussion *supra* Part IV.D.

224. *See* MCCORMICK, *supra* note 5, § 266, at 466; *see also* FED. R. EVID. 408 advisory committee's note.

225. *See* discussion *supra* Part IV.C.

226. *See* 2 WEINSTEIN & BERGER, *supra* note 3, § 408.08, at 408-27.

227. *See* discussion *supra* Part IV.D.1-2.

228. *See* discussion *supra* Part IV.D.3.

229. *See* discussion *supra* Part IV.D.5.

ciple" that "Rule 408 only bars the use of compromise evidence to prove the validity or invalidity of the claim that was *the subject of compromise, not some other claim.*"[230] The Seventh Circuit states that "[a] dispute arises only when a claim is rejected at the initial or some subsequent level."[231] Analyzing the facts of the *Johnson* case under these circuit courts' tests shows that the evidence at issue would probably not be excluded.

The Third Circuit, however, provides the broadest standard in holding that a dispute exists where there is a "clear difference of opinion."[232] The Third Circuit's definition of "dispute" promotes the policy considerations behind Rule 408. Further, it would most likely exclude the evidence at issue in the *Johnson* case.[233] Excluding evidence of an offer to compromise a disputed claim or an acceptance of an offer promotes the public policy of encouraging dispute settlements.[234] Admitting evidence from settlement negotiations causes parties engaging in negotiations to hesitate to communicate freely, fearing that the communications could later be used against them.[235] Therefore, all circuit courts should adopt the Third Circuit's definition of dispute in order to promote the policy consideration behind Rule 408: free communication during settlement negotiations.

VI. CONCLUSION

In deciding issues of evidence under Rule 408, the Ninth Circuit quotes only from the language of the Rule itself or from *McCormick.*[236] The *McCormick* test limits the Ninth Circuit and does not allow the court to expand protection over settlement communications.[237]

Other circuit courts developed different approaches concerning when to consider settlement communications "offers to compromise" under Rule 408. When determining if Rule 408 protects certain communications, courts must decide

230. *See* discussion *supra* Part IV.D.6.
231. *See* discussion *supra* Part IV.D.4.
232. *See* discussion *supra* Part IV.D.7.
233. *See* discussion *supra* Part IV.D.7.
234. *See* MCCORMICK, *supra* note 5, § 266, at 466; *see also* FED. R. EVID. 408 advisory committee's note.
235. *See* Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1106 (5th Cir. 1981).
236. *See* MCCORMICK, *supra* note 5, § 266, at 466.
237. *See* discussion *supra* Part IV.C.

when an "actual dispute" or "an apparent difference of view between parties as to the validity of the claim" occurs.[238] The Ninth Circuit should adopt the Third Circuit's broad approach because it best promotes the public policy of free communication during settlement negotiations.

238. MCCORMICK, *supra* note 5, § 266, at 466-67.

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